

November 22, 2002

VIA HAND DELIVERY

Mr. Robert A. McGuire
Associate Administrator for Hazardous
Materials Safety
Research and Special Programs Administration
U.S. Department of Transportation
400 Seventh Street, S.W.
Washington, DC 20590-0001

Re: Response to Petition for Reconsideration (RSPA-00-7092/PDA-22(R))

Dear Mr. McGuire:

The National Propane Gas Association (NPGA), on behalf of its member companies, submits this timely response to a petition for reconsideration filed by the Attorney General of New Mexico regarding a Research and Special Programs (RSPA) preemption determination (67 Fed. Reg. 59,396 (Sept. 20, 2002)). In its preemption determination, RSPA concluded, with respect to certain provisions of New Mexico law and regulations, that federal hazardous materials transportation law preempts:

- New Mexico's cargo tank inspection requirement, as applied to vehicles based outside the State, because the requirement causes unnecessary delay in the transportation of hazardous materials.
- New Mexico's employee examination and identification card requirements, as applied to non-domiciled, LPG gas carrier personnel, because the hazardous materials regulations (HMR) specifically provide that State training requirements may not apply to drivers domiciled outside the State.
- New Mexico's LPG gas transporter license fee requirements applicable to intrastate and interstate motor carriers that transport, load, or unload hazardous materials in commerce because the fee paid to obtain the license is neither fair nor used for hazardous material transportation purposes.
- New Mexico's vehicle inspection fee, employee examination fee, and identification card fee requirements because the record does not support a finding that the fees are used for hazardous materials transportation purposes.

67 Fed. Reg. 59,396. New Mexico has not provided any information in its petition to justify a change in RSPA's well reasoned and articulated decision and, therefore, we urge RSPA to deny the petition for reconsideration.

For purposes of this response, we incorporate by reference our comments (dated May 15, 2000) submitted in response to a Federal Register notice (65 Fed. Reg. 17,335) regarding RSPA's initial preemption evaluation and only address the issues set forth in New Mexico's petition (dated October 10 and 30, 2002).

Statement of Interest

NPGA is the national trade association of the LP gas (principally propane) industry with a membership of about 3,800 companies, including 39 affiliated state and regional associations representing members in all 50 states. Although the single largest group of NPGA members are retail marketers of propane gas, the membership includes propane producers, transporters and wholesalers, as well as manufacturers and distributors of associated equipment, containers and appliances. Propane gas is used in over 18 million installations nationwide for home and commercial heating and cooking, in agriculture, in industrial processing, and as a clean air alternative engine fuel for both over-the-road and industrial lift trucks.

Analysis of New Mexico's Petition for Reconsideration

The New Mexico provisions at issue fall into three broad categories:

- New Mexico Annual Inspections (NMSA 70-5-9, 19 NMAC 15.4.10.1);
- LPG Handling License (NMSA 70-5-7, 19 NMAC 15.4.9.1-15.4.9.4); and
- New Mexico LPG Annual License Fees (Inspection fees – NMSA 70-5-9, Revenue Suspense Fund – NMSA 70-5-10, 19 NMAC 15.4.14.3(C), 15.4.15.1, 15.4.15.12, 15.4.15.13, 15.4.15.14).

A. New Mexico Annual Inspections

The first category of statutory/regulatory provisions at issue concerns the requirement to have an inspection of all LPG vehicles operated in the State. The applicable statutory provision, NMSA 70-5-9(C), states: "In addition, there shall be paid a reasonable fee for the safety inspection, made by a representative of the bureau, of each LP gas bulk storage plant, LP gas liquid transfer facility and of the LP gas equipment on each vehicular unit used for transportation of LP gas in bulk quantities." The implementing regulation, 19 NMAC 15.4.10.1, states: "There shall be an annual safety inspection, made by an inspector of the Bureau, of each bulk storage plant facility, dispensing station, vehicle fuel dispenser, and cargo container and safety equipment on each vehicular unit used for transportation of LP gas in bulk quantities. Each bulk

plant, dispenser, and vehicular unit shall display a current decal showing it has passed the required inspection.”

RSPA properly concluded that these provisions, as applied and enforced, create an obstacle to accomplishing and carrying out the HMR’s prohibition against unnecessary delays in the transportation of hazardous material on vehicles based outside of the State. 67 Fed. Reg. at 59,400. Thus, pursuant to 49 U.S.C. § 5125(a)(2), RSPA found that the federal Hazardous Materials Transportation Act (HMTA), as amended, preempted these provisions.

In its petition, New Mexico attempts to demonstrate that its inspection procedures do not cause unnecessary delay in the transportation of hazardous material. For example, New Mexico states that “Given nearly three months and inspectors willing to travel anywhere in the state to inspect the vehicles at any time and in any location, any reasonable transporter should be able to have all of its New Mexico licensed vehicles inspected in a timely manner.”¹ Letter from Patrick T. Simpson, Assistant Attorney General, to Nancy Machado, Office of Chief Counsel (October 30, 2002) (hereinafter referred to as “New Mexico Petition”). Further on, New Mexico states that “Review of Bureau Chief Vaughn’s affidavit . . . indicates the New Mexico inspection system is not one in which the inspectors ‘call and demand’ an inspection at a time and place certain.” *Id.* For these reasons, New Mexico concludes “just as with transporters domiciled in New Mexico, transporters domiciled elsewhere ‘should be able to schedule an inspection at a time that does not disrupt or unnecessarily delay deliveries’” *Id.* (quoting 67 Fed. Reg. at 59,400).

New Mexico’s statements miss the mark regarding why the inspection scheme in the State with regard to vehicles based outside of the State causes an unnecessary delay in the transportation of hazardous material and is, therefore, an obstacle to accomplishing and carrying out this HMTA purpose. In its petition, New Mexico appears to argue that the State’s flexibility with regard to inspection scheduling should be taken into consideration. As noted by RSPA in a prior preemption determination, “[t]he inherent potential for unnecessary delay, when a periodic inspection requirement applies to a vehicle based outside the inspecting jurisdiction, is not eliminated by a ‘flexible’ scheduling policy.” 67 Fed. Reg. 15,276, 15,280 (March 29, 2002) (PD-28(R)). In any event, even with a flexible inspection program, the transportation of propane is based on customer needs and, as such, a propane marketer outside New Mexico will likely not know when a shipment is needed in New Mexico until the last minute.

RSPA recognized the “call and demand” nature of propane and concluded that it is “impractical to have all vehicles inspected every year or, alternatively, have a few vehicles inspected in order to be ‘dedicated’ to the inspecting jurisdiction.” *Id.* That is why RSPA has consistently concluded that “a State generally may apply an annual inspection requirement to trucks based outside of its jurisdictional boundaries but only if it can actually conduct an ‘on the

¹ By three month, we assume that New Mexico is referring to the fact that for a renewal license, the inspection must take place with a particular quarter based on the day that the vehicle was initially inspected.

spot' inspection upon the truck's arrival within the jurisdiction." 67 Fed. Reg. at 59,400 (emphasis added); 58 Fed. Reg. 48,933, 48,940 (June 30, 1987) (PD-4(R)); 65 Fed. Reg. 60,238, 60,244 (October 10, 2000) (PD-13(R)).

For these reasons, RSPA should deny New Mexico's petition for reconsideration of RSPA's decision that the HMTA preempts New Mexico's cargo tank inspection requirement, as applied to vehicles based outside the State.

B. LPG Handling License

The second category of statutory/regulatory provisions at issue concerns the requirement to obtain a state LPG handling license. The applicable statutory provision, NMSA 70-5-7(A), states: "The bureau may require each person, firm or corporation that transports or dispenses LP gas or installs, repairs or services appliances, containers, equipment or piping for use of LP gas to have all persons who perform these activities pass an appropriate examination based on the safety requirements of the commission." The implementing regulation, 19 NMAC 15.4.9.1, states: "All personnel whose duties require that they transport or dispense LP gas shall prove by passing an examination, as required by the Bureau, that they are familiar with minimum safety standards and practices with regard to the handling of LP gas. LP gas may not be dispensed by any person who has not passed the examination by the Bureau."

RSPA properly concluded that these provisions violate 49 C.F.R. § 172.701(b) and, as applied and enforced to non-domiciled operators, create an obstacle to accomplishing the goals of the HMTA and HMR. Thus, pursuant to 49 U.S.C. § 5125(a)(2), RSPA found that the federal HMTA preempted these provisions.

In its petition, New Mexico urges RSPA to reverse its decision with regard to the examination requirement because RSPA merely found that the State regulations were more stringent than the federal HMR. New Mexico Petition. Further, relying on the HMTA's goal of uniformity, New Mexico argues that the examination program should be upheld because it is based on National Fire Protection Association Standard 58 (entitled "Standard for the Storage and Handling of Liquefied Petroleum Gases" (hereinafter referred to as "NFPA Standard 58")). Neither of these arguments is sufficient to alter RSPA's conclusion.

An examination is required for, inter alia, anyone transporting or dispensing LPG. The HMTA applies to the transportation, including loading, unloading, and incidental storage, of hazardous materials. 49 U.S.C. §§ 5102(12), 5103(b). Thus, any RSPA training requirements would apply to those individuals transporting LPG in, and dispensing LPG from, a transport vehicle.

RSPA's regulations prescribe minimal training requirements for the transportation of a hazardous material and, therefore, a State may impose more stringent requirements for motor vehicle drivers only if such requirements: (1) do not conflict with the training requirements of

49 C.F.R. Part 172; and (2) apply only to drivers domiciled in that State. 49 C.F.R. § 172.701 (emphasis added). New Mexico's response concentrates on the first prong of the regulations – that a State training requirement, to be upheld, may not conflict with the HMR training requirements. However, the State fails to address the second prong and therein lies the fatal flaw with its regulations.

The second prong of § 172.701 states that the mere fact that a State regulation does not conflict with the HMR training requirements is not enough to pass muster. The State regulation must also apply solely to drivers domiciled in that State. Propane transport and bobtail drivers from outside of New Mexico entering the State and transporting and unloading propane therein are required to take the examination and maintain a current license. Because these drivers are not domiciled in the State, imposing the examination and licensing requirements on them is in conflict with § 172.701 and, therefore, appropriately preempted by the HMTA and HMR.

New Mexico also relies on the fact that the examination and licensing programs are based on NFPA Standard 58 as a basis to argue that these programs should not be preempted. NPGA is a supporter of the adoption of NFPA Standard 58 as part of State's regulation of LPG. To date, all 50 States have adopted NFPA Standard 58 verbatim, by reference, or in large part as part of their LPG regulatory scheme. We commend these efforts. We also note that NFPA Standard 58 "defers" to DOT with regard to the transportation of LPG:

Most truck transportation of LP-Gas is subject to regulation by the U.S. Department of Transportation. Many of the provisions of this chapter are identical or similar to DOT regulations and are intended to extend these provisions to areas not subject to DOT regulation.

NFPA Standard 58, Chapter 6 (emphasis added). Because RSPA provides training requirements for employees engaged in the transportation of LPG (including loading, unloading, and incidental storage), NFPA Standard 58 requirements relating to training should not apply to these employees.

For these reasons, RSPA should deny New Mexico's petition for reconsideration of RSPA's decision that the HMTA preempts New Mexico's employee examination and identification card requirements, as applied to non-domiciled LPG carrier personnel.

C. New Mexico Licensing and Inspection Fees

The third category of statutory/regulatory provisions at issue concerns the requirement to pay an annual license fee for LPG vehicles operated in the State. The applicable statutory provision, NMSA 70-5-9(A), states: "For the purpose of defraying the expenses of administering the laws relating to the use of CNG in motor vehicles or the LP gas industry, each

person, firm, or corporation, at the time of application for a license and annually thereafter on or before December 31 of each calendar year, shall pay to the bureau reasonable license fees as set, classified and defined by the bureau for each operating location. Provided, the total annual fees charged any one licensee for a combination of LP gas activities at one location and subject to licensure under this section shall not exceed three hundred fifty (\$350) dollars, and the fee charged for any single activity operation as set, classified and defined by the bureau shall not exceed one hundred fifty (\$150) dollars." Further, NMSA 70-5-10 states: "All fee money collected under the provisions of the LPG and CNG Act shall be remitted by the bureau to the director of the division to be deposited in the general fund of the state. . . ." The fee structure provided by the regulations is as follows: (1) LP Gas Visual Cargo Tank and Equipment Inspection Form \$37.50 (19 NMAC 15.4.14.3(C)); (2) Wholesale Sale or Delivery of LP Gas \$125.00 (19 NMAC 15.4.15.1); (3) Annual Renewal Fee Per Qualifying Party Identification Card \$10.00 (19 NMAC 15.4.15.12); (4) Licensing Examination Fee \$25.00 (19 NMAC 15.4.15.13); and (6) Licensing Re-Examination Fee \$25.00 (19 NMAC 15.4.15.14).

The New Mexico fees are annual, flat fees unapportioned to the motor carrier's presence or level of activity in the state.² The U.S. Supreme Court has struck down such fees as an impermissible burden on interstate commerce. American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987). In Scheiner, the Court struck down two Pennsylvania lump-sum annual "taxes" on each truck traveling on the state's highways, whether registered there or not. The Court used an "internal consistency" test. To pass that test, "a state tax must be of a kind that, if applied by every jurisdiction, there would be no impermissible interference with free trade. If each state imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the states would be deterred." Id. at 284.

Flat annual fees like New Mexico's discriminate against and impose an undue burden on interstate commerce. Thus, RSPA was correct in its conclusion that federal hazmat law preempts the licensing and inspection fees and that such fees, because they are not used for a hazardous materials transportation purpose, violate 49 U.S.C. § 5125(g)(1).³

In its petition, New Mexico asserts two arguments for reversing RSPA's conclusion with regard to fees: (1) "the fees should not be considered to fall under the federal regulatory

² The State argues "that New Mexico's fee are based on a fair approximation of use, do not discriminate, and are not excessive." New Mexico Petition. However, the State does not provide evidence as to how its flat fees amount to a fair approximation of use. In fact, to the contrary, the State concludes that "[I]f fees were assessed on a per-use basis (i.e., per transfer), each transfer would have to be verified. The program does not have adequate staff to perform this function, nor does it have revenue to increase its staff." Id.

³ Section 5125(g) provides that a State, political subdivision, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose relating to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

scheme”; and (2) “the fees are directly applied to the State’s LP regulatory program.” New Mexico Petition.

It is difficult to understand New Mexico’s argument that the fees collected “are associated only tangentially, if at all, with the transportation of hazardous materials.” New Mexico Petition. The examination, for which there is a fee, is required of “[a]ll personnel whose duties require that they transport or dispense LP Gas . . .” 19 NMAC 15.4.9.1 (emphasis added). Transportation of LP gas is clearly covered by the HMR. Similarly, the loading and unloading of LP gas from a motor vehicle is covered by the HMR.

License fees (both initial and renewal) include transportation activities. For example, a “wholesale licensee” is “authorized to wholesale, transport and/or deliver gas in vehicular units into or out of any location except that of an ultimate consumer.” 19 NMAC 15.4.15.1 (emphasis added). A “retail licensee” is “authorized to deliver, transfer and transport LP gas in a liquid state to the ultimate consumer, both intrastate and interstate.” 19 NMAC 15.4.15.2 (emphasis added).

Finally, there is a fee for the initial and annual inspection of a cargo tank and associated equipment. 19 NMAC 15.4.14.3(C). A cargo tank is a motor vehicle used to transport LPG, clearly an activity covered by the HMR. New Mexico’s argument that its assessed fees do not cover transportation activities is clearly wrong.

Next, New Mexico argues that its fees, if considered to apply to transportation activities, are entirely returned to cover transportation activities. New Mexico Petition. Clearly, New Mexico is trying to assert that the collected fees cover transportation activities to avoid preemption by virtue of 49 U.S.C. § 5125(g)(1).

New Mexico asserts that its fees are collected and deposited in the State’s general fund without being earmarked for a specific use; however, the State asserts that the funds are returned 100 percent to the Bureau because the program operates on a budget of approximately \$625,000, yet fee receipts are only \$25,000. New Mexico Petition. In other words, because the program collects less money than the Bureau’s budget, New Mexico asserts that its funds are “used for” a hazardous materials transportation purpose.

First, by its very statement, New Mexico concedes that it does not earmark the fees deposited in the State’s general fund for hazardous materials transportation purposes. In its determination, RSPA relies on this notion to conclude that New Mexico’s fee program runs afoul of 49 U.S.C. § 5125(g)(1) (67 Fed. Reg. at 59,404 (“CID does not rebut ATA’s or commenters’ assertions that licensing fees deposited into New Mexico’s general fund are not earmarked or actually used for hazardous materials transportation purposes as required under 5125(g)(1). Consequently, RSPA cannot find that the licensing fees collected under the LPG and CNG Act are used for purposes related to hazardous materials transportation.”)).

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Second, New Mexico's statement that the program generates less fees than the Bureau's budget is insufficient to change RSPA's conclusion with regard to 49 U.S.C. § 5125(g)(1). For calendar year 2001, New Mexico states that inspection/licensing fees generated \$25,000 and that the Bureau's annual budget during this same time period was \$625,000. While that may be the case in 2001, in other years the fees generated may exceed the Bureau's budget. Because neither the statutory sections nor regulations at issue require that the fees collected be used for hazardous materials transportation purposes, there is no guarantee in other years that all fees collected will be returned to the Bureau and used for transportation purposes.

Also, even assuming that the money collected is returned to the Bureau, there is no assurance that the fees will be used for hazardous materials transportation purposes. The New Mexico program applies to LPG bulk plants and requires inspections of these facilities and broadly covers "the use of storage . . . for LP Gas and all facilities, equipment, appliances, structures or installations in the State of New Mexico." 19 NMAC 15.4.2.1. Because the Bureau's jurisdiction and authority is broader than the transportation of LPG, it is possible that some of the fees collected through the inspection/licensing of LPG vehicles and operators could be used for non-hazardous materials transportation purposes.

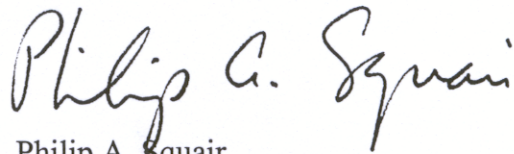
Thus, RSPA properly concluded that New Mexico's LPG inspection and licensing fees were preempted by 49 U.S.C. § 5125(g)(1).

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Conclusion

For the foregoing reasons, we encourage RSPA to deny the Attorney General of New Mexico's petition for reconsideration of RSPA's preemption decision with regard to previously-described New Mexico statutory and regulatory provisions. Should you have any questions regarding our response, please call me at (202) 466-7200.

Sincerely,

A handwritten signature in black ink that reads "Philip A. Squair". The signature is written in a cursive, flowing style.

Philip A. Squair
Vice President, Regulatory and Technical Services

CC: Nancy Machado, Esq., RSPA-Office of Chief Counsel
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